IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COE KANE, *Appellant,*	
vs.	No. 22,168
UNITED STATES OF AMERICA, *Appellee.*	

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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I.

JURISDICTIONAL STATEMENT OF FACTS

On December 16, 1966, the Federal Grand Jury sitting at Tucson, Arizona, returned an Indictment charging Appellant Coe Kane, an Indian, with having wilfully, unlawfully, feloniously, deliberately, premeditatedly, and with malice aforethought, killed and murdered Ethel W. Kane on or about November 26, 1966, on the Fort Apache Indian Reservation in the District of Arizona. (Transcript of Record, Volume I,

Item 1.) (Hereinafter, Appellant will be referred to as "Coe Kane"; Volume I of the Transcript of Record will be referred to as "RC"; the Reporter's Transcript of the hearing on Appellant's Motion to Suppress will be referred to as "S RT," the number following will refer to the page, and the numbers following "L" will refer to the line; the three volumes of the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page.)

On December 19, 1966, Coe Kane was brought up for arraignment, and requested counsel, Leonard Karp was appointed, and the arraignment was continued. (RC Item 30) On December 27, 1966, Robert Hirsh, retained counsel, was substituted for Leonard Karp, and Coe Kane pleaded not guilty (RT Item 30). On December 30, 1966, Coe Kane's Motion to Set Bail was heard and bail was set at $5,000 with $500 in cash to be deposited and trial was set for May 3, 1967 (RC Item 30). On January 3, 1967, Coe Kane was admitted to bail (RC Item 30).

On January 12, 1967, the Government filed a Motion to Continue Trial in order to comply with the provisions of 18 U.S.C.A., §3432 since the new jury panel would not report until May 2, 1967, one day before trial (RC Item 4).

On January 23, 1967, the Motion was granted and trial was reset for May 11, 1967 (RC Item 30).

On May 4, 1967, the Government filed a Motion for Appointment of Expert Witness pursuant to Rule 28, Federal Rules of Criminal Procedure, Title 18 U.S.C.A. (RC Item 5).

On May 8, 1967, the Court granted the Motion and appointed Dr. Marshal Jones and gave instructions to the expert (RC Items 6 & 7).

On May 9, 1967, Coe Kane filed a Motion to Suppress (RC Item 8).

On May 10, 1967, the Motion was heard, testimony and exhibits were received and the Motion was denied (RC Item 11 and 30).

On May 10, 1967, a stipulation between Coe Kane and the Government was filed to the effect that Coe Kane is an enrolled member of the White Mountain Apache Tribe of Indians; that Ethel Kane was an enrolled member of the Hualapai Tribe of Indians; and that the events with which the trial was concerned occurred within the boundaries of the Fort Apache Indian Reservation in the District of Arizona (RC Item 10).

On May 11, 12, 16 and 17, 1967, trial was held before the United States District Judge James A. Walsh and the jury returned a verdict of guilty of voluntary manslaughter on May 18, 1967 (RC Item 30 and 16).

On May 12, 1967, the Court appointed Dr. Hugh Estes as its expert and filed instructions to the expert (RC Items 12 and 13).

On June 5, 1967, the Court entered Judgment of guilty and sentenced Coe Kane to ten years (RC Item 19).

On June 5, 1967, Coe Kane lodged a Notice of Appeal and moved for appointment of counsel and for admission to bail which was granted (RC Items 20, 21, 22 and 26).

On June 12, 1967, application for Order for transcript on appeal was filed by Coe Kane and on June 13, 1967, the affidavit of Coe Kane was filed and a motion for appeal in forma pauperis was filed (RC Items 23 & 24).

On June 13, 1967, the Court entered an Order Granting Leave to Appeal in Forma Pauperis and the Notice of Appeal was filed (RC Items 25 and 26).

This is an appeal from a Judgment entered by the United States District Court for the District of Arizona. This Court has jurisdiction of this appeal by the provisions of 28 U.S.C.A., §1291.

II.
STATEMENT OF FACTS

On the Saturday following Thanksgiving of 1966, that is on November 26, 1966, two young boys from Kentucky, two cousins by the name of Louis Luttrell and his younger cousin Jimmy Lee Luttrell were outside Globe, Arizona, hitchhiking back to Kentucky (RT 100-101; 280). A man they recognized as the defendant, Coe Kane, gave them a ride in his vehicle at around 4:00 or 5:00 p.m. (RT 102; 284). Jimmy Luttrell got in the front seat and Louis Luttrell got in the back seat (RT 102). Jimmy Luttrell smelled what smelled to him like beer on the breath of Coe Kane (RT 102-103). The smell was not strong when they were picked up (RT 103). They wanted to get up to Highway 66 and Coe Kane offered to take them part of the way that night, that he would let them sleep in his car at home, that his home was off the Highway 60 that leads up to Highway 66, but that in the morning he would take them on north to Show Low and drop them off so they could continue on their way by Highway 66 (RT 109; 305). During the ride they talked (RT 110); Coe Kane talked about the war and stated he could get along with everybody except his wife (RT 110 L 9-19; 284 L 7). Coe Kane was driving pretty fast (RT 103 L 21-22). When they went down into the Salt River Canyon, a road that winds down the mountain to the bottom of the canyon and then winds its way up, Coe Kane was driving at a pretty fast rate, fifty or sixty; he went over the double line; at times the cousins did ask him to slow down (RT 103 L 23-25).

As Jimmy Luttrell described, if Coe Kane hadn't driven that highway before and wasn't familiar with it, Coe Kane would have missed some of those curves because he, Jimmy, sure didn't see them (RT 104-105). When they were almost out of the canyon, the oil light went on (RT 106 L 5-8). Coe Kane told them they were going to have to get some oil be-

cause his car was leaking oil pretty bad (RT 106). Coe Kane told them he had a friend that lived up the road from whom he could get oil (RT 106). Jimmy and Louis Luttrell went with him (RT 106-107). Coe Kane walked at a fast rate (RT 106-107). Coe kept saying, "It's just a little ways further, it's just a little ways further." Jimmy and Louis Luttrell estimated they walked from one to two miles to the home (RT 107). They waited outside; Coe came out with the friend who also appeared to be an Indian, and the friend gave them a lift back to the parked car; they put oil in the car and the friend followed them as far as the turn-off for his house on the highway (RT 107). They then proceeded to the junction off of Highway 60 which leads to the Ft. Apache Indian Reservation and also leads to White River, and also leads to the home of Coe Kane at Canyon Day (RT 108). At this junction Coe Kane stopped the car at a service station and put some oil in the car and came back into the car with a six pack of beer, stubbies (RT 109). Jimmy and Louis Luttrell recalled that Coe Kane did not drink at all until they reached that service station; that once they left the service station, Coe Kane offered them a beer each and Coe himself had two bottles of beer, so there were two stubby beers left in the six pack (RT 109; 282-283). They arrived home, Coe Kane's house at Canyon Day, and they remained in the car while Coe Kane went inside (RT 110 L 24 to 111 L 13). Coe Kane came back and took the groceries out, took a rifle out of the car and handed it to his wife, Ethel, and Ethel took the rifle by the case and it started falling to the ground. Coe Kane caught it before it hit the ground and handed it back to her (RT 111; 245). Coe Kane and his wife went inside. After approximately five minutes they came back out and invited Louie and Jimmy Luttrell into the house (RT 111). They all went into the living room (RT 111). Ethel Kane, Coe's wife, picked up the baby off the couch, one of their children, and she and Coe Kane went into the bedroom (RT 285); Jimmy and Louie Luttrell

sat on the couch (RT 285). They could hear talking in there, but not loud voices, not angry voices (RT 111-112). Either before she went into the bedroom with her husband or when they entered the house, Ethel said, "I don't like to be around him when he's drinking." (RT 286 L 19-20) To Louis Luttrell Coe Kane appeared less intoxicated when they arrived at his home (RT 299 L 18-25). Louis Luttrell described both Coe Kane's and Ethel Kane's temperment as flat and meant by that they did not raise their voices (RT 308). (However, Coe Kane did raise his voice in an angry tone when he asked her to bring the beer back (RT 308 L 14-16).) Ethel Kane came out and picked up the remainder of the six pack, the two remaining stubbies, and started out the door. She got as far as the front door and had it open (RT 288) when her husband said, "Where are you going?" she said, "I'll be back." "Where are you going with my beer? Come back or I'll shoot you," (RT 129; 288) and she turned around, walked toward him and told him, "You wouldn't." (RT 288 Louis Luttrell saw Coe Kane pick up a rifle, a heavy rifle; Louis Luttrell is not sure if he levered it. Kane threw it back down by the washing machine and picked up another rifle that had a telescopic lens on it. Government's Exhibit 2, raised it, levered it and aimed it and shot her in the side of the head. That happened in a matter of seconds. Ethel Kane fell to the floor (RT 288-289). Both Louie and Jimmy Luttrell went through that front door which Ethel had left open, ran about a quarter of a mile to a place called Miracle Church where a meeting or service was going on (RT 113-114; 290). Outside the church selling pop from the back of a pick-up was a little young Apache girl about fifteen or sixteen named Ruloh Nosie, whom they asked for help (RT 62). Ruloh went in and told her father, Carl (RT 63). Carl Nosie got up and told others in the congregation and they came outside (RT 68-69). There were lots of cars there from the meeting, and the only car that wasn't caught or blocked by others was Billy Kane's, a

cousin of Coe's (RT 69), so they asked Billy to drive them (RT 69). Jimmy Riley and Carl Nosie rushed to Coe Kane's house (RT 70). Billy Kane left Jimmy Riley and Carl Nosie off while he parked the car; Carl and Jimmy ran around to the kitchen door and they knocked (RT 70). There was no answer. Soon they saw Coe Kane's face at the window, and he said, "It's locked," and he gestured toward the front door (RT 71). Carl Nosie and Jimmy Riley entered, and they found Ethel Kane on the floor with blood coming out of her nose and Coe Kane crying over her. Riley told Kane to move and Coe Kane did (RT 147). Jimmy Riley felt for signs of life and there were no signs of life (RT 72). Carl Nosie saw two rifles in the room and took them to Billy Kane who locked them in the trunk (RT 73). Billy Kane came in and heard Coe Kane saying, "Ethel" and "Baby" (RT 170). Billy Kane left to notify relatives (RT 170). Jimmy Riley had left to go to the closest phone to summon help (RT 150). Riley called police and an ambulance (RT 149-150). Carl Nosie could not smell alcohol on Coe Kane's breath (RT 78) nor did his eyes appear glassy (RT 83). Two tribal policemen, Ed Kahn and Lafe Altaha arrived (RT 75; 182). They went in and Lafe Altaha felt for signs of life (RT 183). They secured the premises (RT 184) after they had placed Coe Kane in the police car, but nothing was said to him (RT 77; 183).

Floyd Chestnut, who is a Bureau of Indian Affairs employee, a criminal investigator, was on a stake-out at the high school that night (RT 217). It took approximately one hour for Chestnut to get there (RT 217 L 15). When he arrived he took pictures (RT 218). Her body was taken by Hupp Sanchez, an employee of the Public Health Hospital at White River, to the Public Health Hospital (RT 214-215). Chestnut looked for bullet holes and cartridge shells, but did not find any (RT 237).

Carl Nosie had Billy Kane open the trunk, and they took the two rifles and they handed them to Ed Kahn who handed

them to Floyd Chestnut (RT 222). Both rifles, Government's Exhibits 1 and 2, were empty (RT 223). Government's Exhibit 1 operates with a clip by bolt action, with Government's Exhibit 2 the ammunition is hand-loaded and is loaded by lever-action (RT 222-223). Grady received Government's Exhibit 1 from Francis Dazen at the police station (RT 275). Floyd Chestnut gave one rifle, Government's Exhibit 2, to Henry Grady (RT 224).

The Government offered the testimony of Dr. Thomas Jarvis, a medical doctor practicing in Globe and St. Johns, who testified that a bullet entered Ethel Kane's head on the left side just above the ear, the parieto-occipital area. The bullet disintegrated on entering the brain; it never exited (RT 48-49). Fragments of the bullet were removed (RT 51). The bullet fractured the skull into three pieces (RT 49). She died almost instantly, in all probability (RT 50).

Coe Kane offered evidence of reputation for being a peaceful and law-abiding person by the following persons who had never heard anything bad: William Glidden (RT 320); James Stevens (RT 325); Wayne Kirkpatrick (RT 329); Rev. Arthur Genther (RT 337); Raymond Kane (RT 566).

There was further evidence of reputation for being a peaceful and law-abiding person by people who had heard these traits of Coe Kane discussed. They were as follows: Father Sylvester Manchester (RT 244), but he had not heard Coe Kane had been arrested for simple assault in October of 1966 (RT 247-248); Ronnie Lupe (RT 252), but Lupe had not heard Coe Kane had been arrested for simple assault in October of 1966 (RT 252), nor had he heard Coe Kane had been arrested for assault and battery in March of 1962 (RT 254); Fred Benashley (RT 259), nor had he heard of the two said arrests (RT 260); Max Taylor (RT 332), nor had he heard of the two said arrests (RT 332-333).

Coe Kane also offered the testimony of four psychiatrists, three of whom, Dr. William Cutts (RT 362-397), Dr. Hu-

bert Estes (RT 465-490), Dr. Marshall Jones (RT 505-532), testified Coe Kane had a pathological reaction to alcohol and the fourth psychiatrist, Dr. L. Willard Shankel, who did not so testify but testified instead that Coe Kane was suffering from a chronic undifferentiated schizophrenic disorder and that Coe Kane was incapable of knowing and understanding what he was doing on November 26, 1966 (RT 536). Dr. Shankel based this diagnosis on Coe Kane's statement to him that he could not remember the shooting (RT 535), and that he had visual and auditory hallucinations during periods of excessive drinking (RT 537-538).

Dr. Cutts based his opinion that Coe Kane did not know the nature and quality of his act (RT 368) on Coe Kane's stating he was unable to recall the period of the shooting (RT 368 L 10-15) and other periods of black-outs Coe Kane said he had (RT 374 L 12-18).

Dr. Cutts related what was told him by Coe Kane as to head injuries three different times, in 1954, in 1960 and in May or June of 1966 (RT 373 L 10-23).

Dr. Cutts had no absolute way to determine if the history Coe Kane related was false except his own opinion that Kane was truthful (RT 380 L 11-17).

Dr. Cutts stated the memory defect must be consistent (RT 382 L 18-21).

Dr. Cutts stated his opinion would be changed if, in the observation of others Coe Kane was crying over his wife and had sent his daughter to summon help (RT 392 L 22 to 393 L 14).

Dr. Cutts testified the consumption of alcohol was the precipitating cause of Coe Kane's not being able to understand the nature and quality of his acts (RT 396 L 24 to 397 L 1).

Dr. Estes testified that there is no objective method to establish whether or not a person is having a pathological reaction to alcohol (RT 469 L 14-20).

Dr. Estes was of the opinion that Coe Kane had a pathological reaction to alcohol and did not know the nature and quality of his acts in picking up the rifle and shooting his wife (RT 472-473).

Dr. Jones testified that but for the alcohol he would not have shot his wife (RT 511 L 3-4).

Dr. Jones did not believe hallucinating was a part of Coe Kane's reaction to alcohol (RT 525 L 9-11).

Dr. Jones' opinion was based on the change in his driving and the reputation for being a peaceful person (RT 529).

Raymond Kane testified for Coe Kane and stated that Coe Kane was his father's first cousin and that he was friendly with him (RT 563 L 7-11). He testified also that he drove Coe Kane's brother and mother to Coe's home that night (RT 564). They went in and saw the body; Raymond Kane came out and walked over to the police van and quoted Coe as saying, "Hey, what am I doing in here. Let me out of here." He stated he repeated it four or five times (RT 564 L 21-23).

Coe Kane testified that on Saturday, November 26, 1966, he and his wife arose early, as they were both going to work. She was a practical nurse at the Public Health Hospital at Whiteriver and he was a heavy equipment operator for the Bureau of Indian Affairs. They first drove by his place of work and no one was there. He then drove her to the hospital. She told him that if he wasn't working that day to drive to Globe to pick up shoes that had been repaired and pictures that had been developed. He had wanted to wait until payday which was on Friday. She wanted him to go on Saturday because she was afraid the pictures would be lost, which had happened to them before (RT 342-344). Coe went on to a friend's house. It was about 6:45 a.m. At approximately 10:00 a.m. he left for Globe and arrived a little after 12:00 noon (RT 345). He picked up the shoes and then picked up the pictures and groceries (RT 345). Coe then went to pick up

hamburgers to eat and decided to have some beer at Pinky's on the way out of town. This was at approximately 1:00 p.m. (RT 346 L 16-17).

He told his wife he would be home by 4:00 p.m. (RT 346 L 4-5). When this conversation took place, he did not state (RT 346 L 2-5).

At Pinky's, Coe ran into a friend, Eddy Edwards, and the friend insisted on having a beer (RT 347). After the second pitcher of beer Coe Kane testified he did not recall what happened (RT 348). He testified "blackouts" had happened to him on previous occasions when he was having a beer or something (RT 348 L 13-19).

Coe came to while walking "to this man's house, we were out of oil." He did not remember leaving Globe or picking up the hitchhikers (RT 348 L 22-25).

He did remember a little before that about being in the Salt River Canyon and one of the boys said the light was going on. Coe looked around and saw someone was in the car and was surprised to find two people in the car (RT 349).

Coe recalls stopping at Carrizo Junction for some beer and drinking one beer but does not remember drinking a second one (RT 350). He did recall a conversation about the Army and was never in the Army (RT 350).

He did not remember his way home "from Cedar Creek on out where I had—they said I had the second beer, I don't remember that until I pulled right in front of the house, you know, right against the house." (RT 350 L 23-25).

Coe Kane met his wife by the door and he stated his wife asked who they were; he replied they were hitchhikers and she told him the rifles were in the car with the hitchhikers. He replied one was in the bedroom and she said, no they were both in the car (RT 351).

Coe testified he had left only one in the house because he was in a hurry and he had not checked it to see if it was loaded

(RT 352). After a leading question and an objection to it, Kane stated it was the .22 caliber, Government's Exhibit 2, he had left in the house (RT 352 L 12-15).

Coe stated the .22 caliber, Government's Exhibit 2, was last used by him on Thanksgiving day and was unloaded, and that the .308 magnum, Government's Exhibit 1, had a loaded clip, but the gun was not loaded. (RT 352-353)

Coe stated he and his wife went outside and obtained something; he did not remember what (RT 354). Once inside the house he remembered showing her the .22 rifle in the closet and told her the hitchhikers had asked to stay in the car overnight (RT 355). He does not remember the hitchhikers coming in. (RT 355 L 1-3) All he remembers is showing her the .22 rifle, presumably Government's Exhibit 2, in the closet in the bedroom and walking into the living room with it in his hands (RT 355).

He did not remember pulling the trigger and had no intention to shoot his wife (RT 356).

He did recall telling his little girl to go get help (RT 356 L 21 to 356 L 7).

He did recall that he was in the dog catcher (RT 357) and talking to Charles Malone in jail the next morning (RT 358) but he did not recall talking to Billy Kane while in the dog catcher (RT 358).

He did not start drinking in Pinky's for any particular purpose except that he ran into a friend (RT 359).

He had no intention of harming Ethel (RT 359).

Coe Kane had drunk in the past and realized he had blackouts (RT 360). Before 1960, he did not have blackouts. (RT 360 L 19-21) In 1960 he had an accident when he was roping and went over his horse head first (RT 361).

On cross-examination he was asked if he told Dr. Cutts whether he got along well with his wife after the birth of his third child which was in 1960, and he replied he had. (RT

399 L 9-11) They did have some arguments, but only once in a while. (RT 399 L 12-14)

Before placing the next question, Government's counsel asked to approach the bench and stated the next question would relate to an argument in 1965 about Coe Kane's going around with another woman and why didn't he let her go to her mother's home with the children to let him go around with the woman. (RT 400-401) Appellant's counsel objected and then conceded that it would constitute pertinent cross examination unless asked in bad faith (RT 401 L 7-10).

The question was put to Coe Kane as to any time in 1965 (RT 403-404) and he did not remember it (RT 404 L 2-3).

He was asked if he told anyone about getting dizzy and he replied only his wife and his parents (RT 407 L 2-11).

He was asked when the dizzy spells started and he replied in 1960 (RT 407). He was asked if he told Dr. Jones that the dizzy spells started in the last eighteen months and he replied he had (RT 407-408).

He was asked what time did he go back to the hospital on November 26, 1966, after he had dropped his wife off and he replied 10 or 10:30 (RT 411). He was asked what time did he arrive in Globe and he replied he didn't know (RT 411 L 17-18). He was asked if he told Mr. Hirsh (Appellant's counsel) 12:00, and he replied he had, but that he didn't really know the time, he was just guessing (RT 411).

He was asked how fast was he driving, and he replied 60 miles per hour on the straight stretches, and as fast as he could on the curves (RT 412).

He was asked what he did in Globe and he related shopping and going for a hamburger (RT 413). He was asked at what time he went for a hamburger and he replied he didn't remember (RT 414, L 1-2). He was asked if he told Mr. Hirsh around 1:00 p.m. and he replied it could have been and on hearing the question repeated he replied he had (RT 414 L 3-6).

He was asked if Pinky's, the place he had said on direct examination, was on the way home, i.e., Show Low (RT 346 L 16-17) and he said it was and then admitted it was not (RT 414-415).

He was asked what time he arrived at Pinky's and he replied 1:30 or 2:00 (RT 415 L 24 to 416 L 1). He was asked if it was as late as 3:00 or 4:00 and he replied it couldn't have been. (RT 416 L 2-3).

He stated he could have had a second glass before his friend Edwards arrived (RT 416).

He was asked if he told any doctor at Whiteriver about his blackouts or dizziness and he replied he hadn't. (RT 417 L 23-25)

He was asked if he went to the doctors for sinus trouble and eye trouble and he "couldn't say." (RT 418-419)

He was asked if he first bought his friend a glass of beer and then a pitcher of beer and he couldn't recall (RT 421). He was asked if he had three glasses out of the first pitcher and he couldn't recall (RT 422).

He was asked if he told Mr. Hirsh on direct examination that the hitchhikers had told him he had two beers in the car and he couldn't recall (RT 423-424).

He was asked where he remembered "coming to" on his trip home and he replied at the bridge at the bottom of the Salt River Canyon (RT 428-429).

He could not recall he had told Mr. Hirsh on direct examination that he "came to" walking to the house. (RT 432 L 4-9)

He could have told Henry Grady on November 28, 1966, he had two beers on his way home, but someone in the jail could have told him that (RT 491-492).

He could not recall calling his wife at the hospital long distance from Globe (RT 492 L 7-12). He could not recall if during this phone call he had an argument with her (RT 495 L 1-4).

He didn't tell anyone at the hospital about the blackout when he had his accident in the summer of 1966 because he was more concerned about his swollen arm (RT 495-496).

He did not know why he took the .308 rifle to Globe (RT 496 L 23-25), and he didn't know why he left the .22 rifle at home (RT 497 L 1-11).

On re-direct examination he denied ever checking the .308 on November 26 to see if it was loaded (RT 499 L 10-13).

On re-cross examination he calls going for sinus trouble treatment but did not tell the doctor about blackouts because he never did give much thought to it (RT 504 L 6-12).

Dr. Gilbert M. Burkel was called for rebuttal by the Government; he was the Medical Officer in Charge of the United States Public Health Hospital at Whiteriver (RT 549-550). He stated he has custody of the medical records and how they are prepared and maintained (RT 550-551). He stated that in July, 1966, Coe Kane was treated following a rodeo accident for a swollen arm and this was the only injury found; he was released (RT 551). In March 1966 he was treated for recurrent sinusitis (RT 551 L 22-24). He was treated repeatedly for sinus trouble and eye infection in 1966 and 1965 (RT 552), and those were the only things he was treated for during that time (RT 552).

Dr. Burkel also testified he knew Ethel Kane, the decedent. On November 26, 1966, he recalled she received a long distance call from Globe about 12:15 to 1:00 p.m. (RT 552 L 13-22). The phone conversation lasted approximately five minutes (RT 553 L 4-5). She raised her voice and appeared upset by the call (RT 553 L 6-22).

On cross-examination, it was brought out he was hospitalized in August 1960 for rodeo injuries, including a possible brain concussion, but when he was discharged the concussion was not diagnosed (RT 554). He remembered the time of the phone call because he was late for lunch and he was fin-

ishing some notes at the nurses' station when the call came (RT 558 L 13-16).

On re-direct, Dr. Burkel testified he was at the hospital when Ethel Kane's body was brought in the evening of November 26, 1966, and he had a conversaiton with a nurse concerning the phone call and that is what impressed it on his memory (RT 561 L 16-23).

Gladys Whatoname was also called on rebuttal for the Government. She stated she was the mother of the decedent (RT 572 L 19-20).

She testified that in 1965 she was riding with her daughter and son-in-law, Coe Kane. She stated Ethel Kane stated she wanted to go live with her mother so that Coe could go around with his lady friend and she wanted Coe to let her take the children (RT 574-576).

On cross-examination she stated she knew who the woman was Ethel was talking about (RT 576).

Edward Edwards was also called on rebuttal for the Government. He testified he went to Pinky's about 4:00 p.m. (RT 579 L 16-18). He saw Coe Kane there (RT 579 L 8-10). Pinky's is south of Globe on the way to the San Carlos Reservation, not the Fort Apache Reservation (RT 579 L 11-15).

First Edwards bought a glass of beer for Coe Kane, then Edwards got his wife out of the car (RT 580). Then three pitchers of beer were bought (RT 581). They were there about an hour (RT 586 L 6-8).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court properly denied a Motion for Judgment of Acquittal at the close of all the evidence because the Government did sustain its burden of proof of sanity of the Appellant at the time of the Commission of the offense.

2. The Trial Court did permit Appellant's counsel (Trial Counsel) to ask if the jurors would be willing to accept lack of mental responsibility through insanity or some other mental defect as a defense (RT 27 L 17-23) and the Court properly denied Appellant's Counsel (Trial Counsel) to voir dire the jury on insanity brought on by the drinking of intoxicating beverages.

3. The Trial Court properly denied Appellant's Motion to Suppress Exhibit 6 which was a photograph of the victim's covered body; Exhibit 8 which was a photograph of the victim's covered body from the kitchen; Exhibit 12 which was a photograph of the victim's covered body from the living room; and any evidence emanating from the seizure and autopsy of the body of the deceased, Ethel Kane.

4. The Trial Court did not err in refusing to exclude evidence that there was a clip in the .308 rifle, Government's Exhibit 1 at 10:00 p.m.

5. The Trial Court properly denied Appellant's Counsel (Trial Counsel) offer of proof as follows: "My question would be if he has *an opinion* as to Kane's reputation for truth and veracity; then depending on the answer, whether he would believe him under oath. And the reason I would propound these questions, I don't think they are admissable until such time as the credibility of the defendant has been attacked and in the light of what the witness has testified it now becomes a credible matter." (RT 567 L 11-17, emphasis supplied.)

6. The Trial Court did not err in failing to give defendant's requested instruction numbered 14 as having been covered insofar as it was proper.

7. The Trial Court did not err in failing to give defendant's requested instruction numbered 28.

8. The Trial Court did not err in refusing to exclude evidence offered through the decedent's mother as to a conversation when at the time of the foundation question to Appellant, Coe Kane, Appellant's Counsel (Trial Counsel) conceded it was pertinent cross examination. (RT 401,L 7-10)

9. The Trial Court did not err in not sustaining the objections to the question put to Appellant on the grounds of ". . . no foundation; number two, if the answer is yes, it is irrelevant, not adding to any issue in this case, evidence of some prior bad act by the defendant, is inadmissible, a prejudicial question. I would suggest there is insufficient proof, even if this were answered—."

10. The Trial Court did not err in not allowing Appellant's Counsel (Trial Counsel) to ask character witnesses for the defense as to "alleged numerous arrests" being made on the Fort Apache Indian Reservation.

IV.

SUMMARY OF ARGUMENT

1. There was sufficient evidence upon which the sanity of the Appellant at the time of the commission of the offense could be found beyond a reasonable doubt.

2. The voir dire of the jurors was not unduly restricted by the Trial Court.

3. The entry into the premises did not constitute an unreasonable entry.

4. There was a sufficient showing of a chain of custody to show the .308 rifle, Government's Exhibit 1, was unloaded when Floyd Chestnut received it.

5. Reputation evidence as to truth and veracity must be based on the knowledge of the witness not the opinion.

6. Defendant's requested instruction number 14 was covered insofar as it was proper by the Court's instruction.

7. Defendant's requested instruction number 28 was covered insofar as it was proper by the Court's instruction.

8. The foundation question to Appellant and the witness supplying the question put to Appellant by decedent was properly admitted.

9. The alleged "numerous arrests" of other Indians on the reservation was properly excluded.

V.

ARGUMENT

1. There was sufficient evidence upon which the sanity of the Appellant at the time of the commission of the offense could be found beyond a reasonable doubt.

Appellant argues that

> "(T)he record in this case shows that the defendant produced four qualified psychiatrists that testified that defendant was legally insane at the time of the commission of the crime charged. In addition to the foregoing there was lay testimony that the defendant acted in a strange and unusual manner sometime before the commission of the crime charged and sometime thereafter."

As is set out in the Statement of Facts herein, one of the psychiatrists, Dr. Shankel testified that Coe Kane was suffering from a chronic undifferentiated schizophrenic disorder and that Coe Kane was incapable of knowing and understanding what he was doing on November 26, 1966. (RT 536) Dr. Shankel based this diagnosis on Coe Kane's statement to him that he could not remember the shooting (RT 535) and that he had visual and auditory hallucinations during periods of excessive drinking. (RT 537-538)

Dr. Jones testified that he did not believe hallucinating was part of Coe Kane's reaction to alcohol (RT 525, L 9-11). Drs. Cutts and Estes did not mention any hallucinating by Coe Kane (RT 362-398 and 465-490). Dr. Estes did not believe him to be schizophrenic (RT 482, L 2).

Drs. Jones (RT 509), Cutts (RT 368) and Estes (RT 472-473) all testified that in their opinion Coe Kane was suffering from a pathological reaction to alcohol at the time of the offense and did not understand the nature or the quality or both the nature and quality of his act.

All four psychiatrists based their opinion on what Coe Kane related to each of them and that in their opinion Coe Kane was truthful (Dr. Cutts, RT 374 L 21-23; Dr. Estes, RT 486-487; Dr. Jones, RT 51 L 13-16; Dr. Shankel, RT 534 L 15-18).

It is interesting to note that the one different diagnosis was by the psychiatrist who saw him first: Dr. Shankel on April 24, 1967 (RT 534, L 10-11); Dr. Cutts on May 1, 1967 (RT 364, L 7-11); Dr. Jones on May 10, 1967 (RT 507, L 9-10); Dr. Estes on May 13, 1967 (RT 470, L 17-22).

Dr. Cutts stated his opinion would be different if prior to his crying period as observed by others he said that he had told his daughter to go summon help (RT 393, L 3-14). (Please see testimony of Coe Kane where he did just that, RT 356, L 21 to 356, L 7.)

The cross-examination revealed that Coe Kane did not recall statements made on direct examination (Please see Statement of Facts for example (RT 411, 414 and 432). If he were faced with a statement made by him as to events he now stated he could not recall, he would say these facts were told to him in jail before he was taken to the U. S. Commissioner (RT 491-492). Who these people were who told him things he could not remember, and yet Floyd Chestnut (RT 41, L 16-24 and RT 449), Henry Grady (RT 262, L 11-16), Lafe Altaha (RT 183, L 1-12), Edgar Kahn (RT 197, L 1-12), the investigating officers, and Carl Nosie (RT 71-75), Jimmy Riley (RT 147-151), and Hupp Sanchez (RT 214, L 2) did not talk to him, and Billy Kane (RT 177, L 1-21) and Raymond Kane (RT 569, L 20 to 565, L 2) related his questions and they made replies they could not help him.

The Luttrell cousins did not see him from the time of the shooting until trial (please see their entire testimony, RT 100-141 and 279-311).

The jury did not find Coe Kane to be a credible witness. Appellant's counsel characterizes the testimony of the lay wit-

nesses saying that Coe Kane was acting strangely. Without repeating the entire testimony of the Luttrell cousins, the Tribal Police officers Lafe Altaha and Edgar Kahn, Carl Nosie, Jimmy Riley, Billy Kane and Raymond Kane, it is respectfully submitted that they did not describe his actions as strange. The Luttrell cousins described him as happy, Carl Nosie felt sorry for him and didn't try to talk to him, etc.

It is respectfully submitted that the only behavior that can be characterized as "strange" was Coe Kane's asking what he was doing in the wagon (see testimony of Billy Kane RT 177 and Raymond Kane RT 564-565).

The Tribal Police officers were the first on the scene. They were well trained, it is respectfully submitted. If they told Coe Kane he was under arrest, their actions could have been interpreted as the tribal court taking jurisdiction and thus have ousted the Federal Court from jurisdiction. Floyd Chestnut, the only Federal Officer, didn't arrive until approximately an hour later since he was on a stake-out at the high school and they couldn't reach him (RT 217). So it was quite natural that Coe Kane should ask why was he in the paddy wagon.

The witnesses who stated they knew his reputation for being a peaceful and law abiding person did not appear to know that much about his reputation.

As was stated in *Michelson v. United States* (1948) 335 U.S. 469 at page 479:

> ". . . It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans."

The Government offered Government's Exhibit 17 for Identification, out of hearing of the jury as proof of its good faith (RT 590).

The Court cautioned the jury and Appellant's counsel (Trial Counsel) as follows, at the time the first questions were asked:

> "THE COURT: No, that wouldn't have anything to do with it. The only — let me explain to you, counsel, this question that the Government is permitted to ask is only to test the witness' knowledge of his reputation. The witness says that he knew his reputation for peace and quietude and this is asked to test that reputation. That's the only purpose of it, so the number of times other people got arrested in White River would be immaterial.
>
> "MR. HIRSH: Well, could I request the Court to instruct the jury as to what the Court stated, that this is to be considered not substantively?
>
> "THE COURT: I think I said that. It's for the purpose of testing the witness' statements that he did know his reputation. Then he's asked if he has ever heard this." (RT 248, L 23 to 249 L 11)

As was stated in *Gallion v. United States* (9th Cir., 1967) ..... F.2d ..... at page ..... in a trial in which the Court sat as the finder of fact: (At the time of the writing of this brief *Gallion* was not published, but it is Ninth Circuit Number 21, 479, dated November 30, 1967, at the last page of the slip sheet opinion)

> "The district judge was not bound by the opinion of the doctor. *Mims v. United States,* 375 F.2d 135, 140 (5th Cir. 1967); *Holm v. United States,* 325 F.2d 44 (9th Cir. 1963). There is no showing that the district judge arbitrarily ignored the expert testimony. His opinion shows that he considered the expert testimony together with all the other facts in the case."

As was stated in *Mims v. United States* (5th Cir., 1967) 375 F.2d 135 at page 140-141:

"We agree with the appellant's statement of the general rule governing the burden of proof on the sanity issue in federal criminal cases. The sanity of the accused is always an element of the offense charged; and the presumption of sanity, standing in the place of evidence when no question is raised about the issue, takes care of the prosecution's burden of proving sanity. But when evidence of insanity is received, regardless of the source, that presumption disappears, and the prosecution has the burden of proving the mental capacity of the accused beyond a reasonable doubt.[1] However, no case has been cited to us, and we have found none, laying down the arbitrary rule that an accused is entitled to a judgment of acquital merely because he offers expert opinion evidence on the issue of his insanity and the prosecution attempts to rebut it without expert witnesses. On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the *credibility* and *weight* of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted.[2] The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise and balancing of opinions of expert witnesses in reaching its decisions,[3] and that there is no rule of law that requires the judgment of witnesses to be substituted for that of the jury.[4]"

As was stated in *Buatte v. United States* (9th Cir., 1964) 330 F.2d 342 at page 344:

"This account of the testimony relating to defendant's insanity is sufficient to disclose *that the evidence on that point was substantial and reasonably impressive.*" (Emphasis added)

It is respectfully submitted that the evidence of insanity was not substantial and definitely not impressive.

Furthermore, Coe Kane knew of these blackouts. The three psychiatrists who stated Coe Kane was suffering from a pathological reaction stated but for the alcohol, Coe Kane would not have had what they believed he had. See Dr. Cutts

at RT 396-397, Dr. Estes RT 468, and Dr. Jones RT 511. Further, Dr. Shankel also expressed it as the precipitating cause of his psychotic state (RT 545, L 21-25)

The Court instructed on voluntary intoxication as follows:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose of intent is a necessary element to constitute any particular species or degree of crime, such as, for instance, the first degree murder in this case or the intent to kill must exist, whenever the actual existence of such an intent is a necessary element to constitute the offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose or intent with which he committed the act.

"If and when the proof shows that the defendant unlawfully killed a human being, and if the evidence also shows that at the time of the mortal assault the defendant was intoxicated, the jury is permitted and ought to consider such evidence of intoxication for the purpose of determining the intent with which the act was done.

"Although intoxication or drunkenness alone is not a defense, the fact that a person may have been intoxicated at the time of the commission of the crime may negative the existence of specific intent. Accordingly, evidence that a defendant acted while in a state of intoxication is to be considered in determining whether or not the defendant acted with the specific intent charged in the Indictment.

"If the jury has a reasonable doubt from the evidence in the case whether because of the degree of his intoxication the mind of the accused was capable of forming or did form the specific intent required to commit an offense included in the Indictment, the jury should acquit the accused as to such an offense." (RT 621, L 14 to 622, L 18)

This instruction, combined with the instruction as to specific intent (RT 623, L 7 to 624, L 6), as well as the instruction on the elements of the offenses included in the Indictment, i.e., murder in the first degree, murder in the second degree, and voluntary manslaughter (RT 609, L 21 to 618, L 22) meets the test of *Rivers v. United States* (9th Cir., 1966) 368 F.2d 362 at pages 363-364.

It is respectfully submitted that there was sufficient evidence to find Coe Kane sane at the time of the commission of the offense.

2. The voir dire of the jurors was not unduly restricted by the Trial Court.

(It should be noted, although circumstantial evidence of it only appears in the record that the Government's counsel prior to trial informed the Court and Appellant's counsel (Trial Counsel) that it was specifically not going to seek the death penalty. The jury was not asked these questions on voir dire, and the Government's counsel told the jury specifically that at the end of the Opening Statement, RT 39, L 5-8.)

The voir dire of the prospective jurors by the Court covered thirteen pages of transcript (RT 5-18) and is too lengthy to set out here.

Among all the questions asked, the Court did ask as follows:

> "It may be that in this case—and I try to cover all events at all times in these instructions, I am not predicting anything that will happen because that will depend on the evidence presented, but there may be raised in this case the question of the mental competency of the defendant, Mr. Kane, on the 26th day of November, at the time that the acts are alleged to have been committed by him according to the Indictment. Now, if that should happen, if that issue should arise, then the Court would give you instructions as to the law governing the sanity. Among other things the Court would tell you that the Govern-

ment had the burden of proving the sanity of the defendant at that time. If the issue comes up, the Court would tell you also what the Government would be required to do in order to establish the elements of sanity in the case. Now, if that should happen and the jury is instructed to that issue, is there anyone who would have any difficulty in the case accepting the law regarding the burden of proof as to sanity, the definition of sanity and when sanity is legally established? If the Court should give you those instructions in the trial of this case, is there anyone who would have any difficulty in accepting those principles of law any more than you would any other principle that the Court might give you in the instructions?" (RT 17, L 10 to 18, L 7)

Appellant's Counsel (Trial Counsel) then asserts the following soliloquy was an undue restriction on voir dire:

"MR. HIRSH: Anybody else who has some experience or training in this, special knowledge? Have any of you had any medical training, particularly training in neurology? Have any of you had any training in sociology or psychiatry? Are there any of you that might have any ideas that would indicate or would cause you to believe that psychiatry isn't a valid science or you don't feel that there is any merit to psychiatry? The Court advised you that, of course, the Government has the burden of proving any element of the offense charged beyond a reasonable doubt. One of the elements, I might point out, that there has to be an intent to kill or —

"THE COURT: Mr. Hirsh.

"MR. HIRSH: This is prefatory.

"THE COURT: I am going to instruct the jury. You may well be way off in what I instruct them.

"MR. HIRSH: Well, my question would be, Your Honor, —

"THE COURT: Don't tell them what the elements are because the Court will do that; and, if you get off into

something that isn't proper the Court isn't going to instruct them as to that, so don't attempt to instruct the jury as to the law.

"MR. HIRSH: May I — perhaps I could approach the bench and advise the Court what my question would be.

"(Discussion at the bench out of the hearing of the jury, as follows:)

"MR. HIRSH: I'd like to make a record on it. My feeling is this: My defense obviously is that there is a lack of intent by virtue of no mental responsibility by insanity, and I feel that I have to voir dire the jury.

"THE COURT: I asked them about the fact that they will follow the Court's instruction as to insanity and what constitutes proof of insanity, and don't go into instructing what the law is or what the Court is going to tell them the law is, because that's the Court's job.

"MR. HIRSH: I am trying to stay away from it. My first question: If any of you had a reasonable doubt as to whether the defendant intended to kill, would you be willing to —

"THE COURT: That's improper.

"MR. HIRSH: If I can make a record. Let me finish, then the Court can overrule. —Would you be willing to acquit him notwithstanding the fact that there was or might be evidence that the defendant might have pulled the trigger that inflicted the fatal flaw?

"THE COURT: The Court objects to that. There will be an instruction, and I will instruct you not to ask that question.

"MR. HIRSH: That's one of the defenses that may be interposed by the defendant, was a lack of mental responsibility through insanity or some other mental defect. —Are there any of you who might be willing to accept that as a valid defense?

"THE COURT: I have asked it in another way, but you may ask that if you want.

"MR. HIRSH: If there were reasonable doubt as to the sanity of the defendant at the time the offense was committed, would you then be willing to acquit the defendant?

"THE COURT: The Court is going to instruct them as to that. We may not get insanity in here.

"MR. HIRSH: Would you follow the law as to insanity if you were so instructed by the Court, if you knew that the insanity was brought on by the drinking of intoxicants?

"THE COURT: Short of delirium tremens, it couldn't be—can't be. If it's something that was brought about by voluntary intoxication, and it's a lack of—unless it did, it isn't a defense.

"MR. HIRSH: You would not allow me to ask this question?

"THE COURT: That's right.

"MR. HIRSH: The defendant may or may not testify in this case, and if he does testify, would you be willing to judge his testimony by the same rules?

"THE COURT: Go ahead with that.

"MR. HIRSH: Can you decide the case on the evidence and the law and set aside any emotional reaction that you might have in the case? And that would be the extent of it.

"THE COURT: All right." (RT 25, L 21 to 28, L 20)

At page 28 of the Appellant's Opening Brief, Appellant states at the end of the first full paragraph that,

". . . it is just as logical to permit a searching of the witnesses' feelings towards defense of insanity *and the prospective testimony of psychiatrists.*"

It is respectfully submitted no restriction on psychiatrists was made. He asked a question as to psychiatrists in the fourth question at the beginning of the preceding quotation (RT 25, L 25 to 26, L 3).

One would have to assert that the Trial Court in its mind was restricting Appellant's Counsel (Trial Counsel) from going into people's opinion of psychiatry because surely the record does not so disclose.

It is respectfully submitted the Trial Court exercised its sound discretion in ruling as it did, and the scope of voir dire rests in the sound discretion of the Trial Court. *Johnson v. United States* (9th Cir., 1959) 270 F.2d 721 at page 724, cert. den. 362 US 937, 4 L.Ed. 2d 751, 80 S. Ct. 759.

3. The entry into the premises did not constitute an unreasonable entry.

The Trial Court at the hearing of the Motion to Suppress stated and found as follows:

> "THE COURT: No, we are not. We are going to have circumstances like these where the police get an emergency call, which, as the officer said, meant a shooting or stabbing, and he went to investigate; he came to the premises, the door was open, as he was going to step in he could see a body and, 'I, on seeing the body, I came further in,' and there he found the lady on the floor, Mr. Kane weeping over her; that Mr. Kane makes no statement, Mr. Kane says nothing. Mr. Kane doesn't give any explanation as to what happened. It's his house, his wife. They finally get him off the body and check for signs of life; it's determined that she is dead, it's determined that she died a violent death. There is no weapon at hand, so suicide would not be readily in the picture. She is there with a wound in the middle of her head which is evidently caused or believed to be through the nose and she dies and Mr. Kane is there for ten or fifteen or twenty minutes and he says not one word about, 'I found her this way.' 'She fell in the bathroom,' or anything. He just says nothing, and he is there with the body of his dead wife who has died a violent death. And I would say it's very clear that the officer had reasonable grounds to believe—that a reasonably prudent person would believe that a felony had been committed,

that this lady had died a violent death; and further, from the circumstances, he there weeping, offering no explanation, they had reasonable cause to believe that he had connection with it, whether it was involuntary manslaughter, an accidental thing or whether it was voluntary manslaughter, or whether it was murder, they knew that a felony had been committed and had reasonable cause to believe that he had committed it. So the arrest was lawful in my findings." (S RT 48, L 12 to 49, L 16)

It is respectfully submitted that Appellant in his opening brief on page 31-32 overlooks the findings of the Trial Court that the entry was reasonable and that the subsequent taking into custody was based on probable cause, and as the Court stated:

"THE COURT: No, there being a lawful arrest and having secured the house, actually, there was a right to make a search in connection with the arrest and there is no necessity that you must immediately go out and make the search so long as you do it reasonably in connection with the arrest and you are permitted to make it thoroughly, and the officers there being limited were probably well advised to just keep the scene secure until they could get somebody there who would conduct the search, probably someone more experienced than they to conduct the search, and I think the search incident to the arrest, the mere lapse of time from when the defendant was placed under arrest and the time when Mr. Chestnut got there and the search was made would not be an unreasonable delay in the search and it would be a search incident to the arrest. So the Motion to Suppress is denied for those reasons." (S RT 50, L 6-21)

The Tribal policemen receive an emergency call, which to them means a stabbing or a shooting, were they not supposed to check for signs of life on the body they saw a portion of through an open door?

Floyd Chestnut, the Criminal Investigator for the Bureau of Indian Affairs, testified he was in the high school on a

stake-out when the call came in to the station and when they tried to summon him by banging on the door he did not answer, thinking it was the burglars (S RT 36, L 23-24 and 43, L 13 to 44, L 1).

Counsel asserts that while the Tribal Police is trying to summon the Federal Officer they should have been down at Globe, Arizona, getting a search warrant.

The relevant test is not whether it is reasonable to procure a search warrant, but whether the search is reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. *United States v. Rabinowitz* (1950) 339 U.S. 56 at page 66.

It is respectfully submitted the Motion to Suppress was properly denied.

4. There was a sufficient showing of a chain of custody to show the .308 rifle, Government's Exhibit 1, was unloaded when Floyd Chestnut received it.

Appellant's counsel at page 42 of Appellant's Opening Brief asserts the objection was on the present condition of the weapon, without the safeguards of showing chain of possession, is irrelevant to the issues in the case. Reading of the transcript would show to the contrary as to the basis of counsel's objection:

> "MR. HIRSH: Pardon me. I'll have to object to this as being irrelevant. I think there might be some probative value to determine if the clip was in it that particular evening, but I understand what evidence might be adduced subsequent to this time, but I don't feel it is relevant, the determination at this time whether there was a clip in the .308 at 10:00 o'clock in the evening. It has some significance of what might develop at a later time." (RT 222, L 19 to 223, L 1)

Passing for now the question of counsel changing the grounds for objection between the time of trial and of appeal, it is respectfully submitted the chain of custody was shown from the finding of the two rifles by Carl Nosie to Billy Kane who locked them in his car trunk (RT 73) until the rifles were handed to the Tribal Policeman Ed Kahn, who gave them to Floyd Chestnut. (RT 222)

In *Pasadena Research Laboratory v. United States* (9th Cir., 1948) 169 F.2d 375 at pages 381-382, this Court held there is a presumption that not only will public officers do their duty but private persons as well, unless the circumstances of the case overcome the presumption.

It is respectfully submitted there was a sufficient chain of custody shown to 10:00 p.m. on November 26, 1966.

With regard to Counsel's assertion that the objection at trial was to chain of custody, it is respectfully submitted the objection was to relevancy. Since Counsel has chosen to ignore those grounds on Appeal, the Government will not answer the relevancy argument, although it is respectfully submitted Appellant's Counsel should not be allowed to argue this new ground.

5. Reputation evidence as to truth and veracity must be based on the knowledge of the witness not the opinion.

As was set out in the Opposition to Specification of Errors, in paragraph 5, Appellant's Counsel's (Trial Counsel) offer of proof on Raymond Kane was that Kane had an opinion as to Coe Kane's reputation (RT 567, L 11-17).

The witness' testimony must not be based on his own opinion. Udall's *Arizona Law of Evidence,* §66, Character and Reputation, citing 7 Wigmore, *Evidence* (3rd ed.) §1981, 1982.

It is respectfully submitted the Court properly stated it would sustain an objection assuming there was an objection (RT 567, L 18-20).

6. Defendant's requested instruction number 14 was covered, insofar as it was proper, by the Court's instruction.

At page 11, Counsel asserts as error the Court's "failure to give the *following portion*" of defendant's requested instruction, and sets out the first paragraph only (with the first sentence of the first paragraph omitted) of a four paragraph instruction.

Appellant's counsel stated he had made his record by offering it (RT 597, L 22 to 598, L 1).

The Trial Court in ruling on the said instruction held as follows:

> "14. It is to be given, except I have a first paragraph modified in my instruction and I don't use the last paragraph. I have my own first paragraph on this instruction and I don't use the last paragraph. It is covered by the Court's instruction insofar as proper." (RT 594, L 16-20)

Defendant's Requested Instruction number 14 is as follows:

> "You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. Ordinarily, it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testified, or by the character of the testimony given, or by evidence to the contrary of the testimony given.
>
> You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also

any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves."

The Court instructed as follows:

"In carrying out your function as judges of the credibility of the witnesses and the weight and effect of their testimony, you may take into account the manner in which the witness testifies, the character of the testimony given, any contradictory evidence which has been produced in the case. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, his or her manner and demeanor while on the witness stand. Consider also any relation each witness may bear to either side of the case the manner by which each witness may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other credible evidence in the case.

"Inconsistencies and discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause the jury to discredit the testi-

mony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood." (RT 606, L 18 to 607, L 18)

As was stated by this Court in *Rivers v. United States* (9th Cir., 1966) 368 F.2d 362 at page 364:

"If proper and adequate instructions are given, defendant has no right to have his choice of language used in the way he prefers it. *Tucker v. United States,* 151 U.S. 164, 170, 14 S.Ct. 299, 38 L.Ed. 112 (1893)."

If counsel now argues the Court's Instruction which he had not heard at the time the Court ruled did not cover this point sufficiently, he had the opportunity to request it. As the Court told both Counsel:

"I told Mr. Hirsh that when the instructions are concluded, I will ask counsel if you have anything further and if either of you want to request something else or object to something I have given, just say yes and with that I will excuse the jury and we will make a record in the absence of the jury. I won't ask you if you want any exceptions or objections but just: 'Do counsel have anything further,' and you just say, 'Yes.'" (RT 598, L 3-10)

Mr. Hirsh had nothing further (RT 627, L 2).

Now he argues that it should have been given and gives as a reason that it appears the expert testimony was rejected (page 49 of Opening Brief). This somewhat illogical argument overlooks the law on expert opinions as was stated by the Trial Court (and as was set in Argument, paragraph number 1):

". . . or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely." (RT 608, L 5-7)

7. Defendant's requested instruction number 28 was covered insofar as it was proper, by the Court's instruction.

Defendant's requested instruction number 28 was as follows:

"In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed.

Thus in the crime of murder or manslaughter, a necessary element is the existence in the mind of the perpetrator of the specific intent to unlawfully take the life of another human being and unless such intent so exists that crime is not committed."

The Court instructed at page 612-613 on malice aforethought:

"Malice is the formed desire of doing mischief to another. It includes anger, hatred, revenge, and every other unlawful or unjustifiable motive. It is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive—a thing done with a wicked mind—where the fact has been attended with such cicumstances as evince a plain indication of a heart reckless of ordinary duty and bent on mischief.

"Malice may be sufficiently shown if a dangerous act likely to produce death or great bodily injury is committed deliberately by a sane person with reckless disregard of consequences and without legal justification.

"If a sane man assaults another under circumstances which will not in law either justify, excuse or extenuate the assault, and with intent to do him bodily injury, and death results, malice sufficient to constitute murder will be implied if the act be of such nature as plainly and in the ordinary course of events must put the life of the deceased in jeopardy, although the resulting consequences, that is, the death of the assaulted party was not specifically con-

templated. In this regard, every sane man is presumed to contemplate and intend the natural and probable consequences of his own deliberate acts.

"The word 'aforethought' used in connection with malice in the definition of murder implies an action of the brain prior to the act causing death. The term aforethought implies a malicious intention preceding the doing of the act which results in death.

"You will recall that murder in the first degree is defined as murder that is willful, deliberate, malicious and premeditated. The terms malice and malice aforethought have just been defined to you in these instructions.

"The word willful as used in the definition of first degree murder means intentional as distinguished from accidental or involuntary." (RT 612, L 6 to 613, L 21)

The Court then went out to complete the murder instruction and went on to define voluntary manslaughter.

"Voluntary manslaughter is defined by the Statute as the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion. Voluntary manslaughter differs from murder in that the premeditation and deliberation and malice aforethought required for murder in the first degree, and the malice required for murder in the second degree, are not necessary to a verdict finding voluntary manslaughter.

"Voluntary manslaughter is distinguished from murder principally in this: That though in voluntary manslaughter the act which occasions the death be unlawful or likely to be intended with bodily mischief, that the malice, express or implied, which is an essential element of murder is wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient.

"When the mortal blow, although unlawful, is struck in the heat of passion or excited by a sudden quarrel, such as amounts to adequate provocation, the law out of forebearance for the weakness of human nature will disregard the actual intent and will reduce the offense to manslaugh-

ter. In such case, even if an intent to kill exists, the law deems that malice, which is an essential element of murder, is absent.

"To reduce an intentional felonious homicide from the offense of murder to voluntary manslaughter on the ground of sudden quarrel or heat of passion, the provocation must be considerable. That is to say, it must be of such a character and degree as naturally would excite and arouse the passion and the assailment must act under the smart of the sudden quarrel or heat of passion." (RT 616, L 14 to 618, L 22)

The Court also instructed on intent:

"In every crime there must exist a union or joint operation of act and intent, and the burden is always on the prosecution to prove both act and intent beyond a reasonable doubt.

"Intent may be proved by circumstantial evidence. In fact, it ordinarily can be established by no other means. This is true because while witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. In determining the issue as to intent, the jury are entitled to consider all of the statements made and the acts done or omitted by the accused and all facts and circumstances in evidence which may aid in determining state of mind.

"Intent and motive should never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted. The motive or lack of motive of the accused is immaterial except insofar as evidence of motive or lack of motive may aid in determining the state of mind or aid in determining intent." (RT 623, L 7 to 624, L 6)

It is respectfully submitted the jury was properly instructed.

8. The foundation question to Appellant and the witness supplying the question to Appellant by decedent was properly admitted.

As was pointed out in the Statement of Facts, Trial Counsel conceded the question to be put to Coe Kane (RT 400 L 23 to 401 L 2) was proper cross-examination at the time counsel were at the side of the bench (RT 401, L 7-10).

The question was then put to Coe Kane and his counsel objected (RT 403, L 10-15). The Court overruled the objection and Coe Kane said he did not recall (RT 403, L 20). Coe Kane tried to limit the answer to October and counsel stated anytime in 1965 (RT 403, L 21 to 404, L 1) and he did not recall it.

This question had been preceded by the following questions:

"Q '60, and it was from that time on you told Dr. Cutts you had no further difficulties with your wife?

"A Yes, ma'am.

"Q Never had arguments about anything else?

"A We do have arguments and fights but not, you know, regular, just once in a while you might say.

"Q What would these arguments consist of?" (RT 399, L 9-15)

Appellant's Counsel objected and the Court overruled it. Then the next questions and answers followed:

"Q (By Miss Diamos) These arguments that you said occur with her regularly, what were the arguments about?

"A Mostly money problems.

"Q Any drinking problems, any arguments about that?

"A Yes, ma'am.

"Q Any arguments about anything else?

"A Drinking and money is all.

"Q Pardon?

"A Just those two.

"MISS DIAMOS: If the Court please, I would ask to approach the bench on these next questions." (RT 400, L 6-16)

Mrs. Gladys Whatoname testified as follows:

"Q How did she say it, what were her words, what words did she use?

"A Use the same words?

"Q Yes, the words, use the same words.

"A Yes.

"Q Would you?

"A Yes.

"Q Tell us please.

"A She wanted to go home with me.

"THE COURT: Did she say that?

"A Uh-huh.

"THE COURT: It may stand.

"Q (By Miss Diamos) Did she say anything else?

"A On account of Coe going with another lady.

"Q Did she say that?

"A Uh-huh.

"Q Did she say anything about the children?

"A And wanted to know if Coe could let her have the kids so she can go home with us.

"Q Did she say anything else about Coe?

"A If he still wanted to go with the girl, 'I would like to go home with my mother.' That is all she said to Coe. Coe didn't answer." (RT 575, L 10 to 576, L 7)

Counsel asserts this is hearsay. Coe Kane stated they argued over money and his drinking. This argument was over a different subject and occurred approximately one year before her death.

As was stated in Udall, *Arizona Law on Evidence,* §63, Impeachment by Prior Inconsistent Statements, at page 87:

"Similarly, a witness may be impeached by a showing that a statement of fact contrary to his present testimony

was made on a former occasion in his presence and adversely affecting his rights, and that he made no reply." Citing McCormick on Evidence, §34.

It is respectfully submitted the questions were properly admitted, as was the testimony of Gladys Whatoname.

9. The alleged "numerous arrests" of other Indians on the reservation was properly excluded.

It should be pointed out that Appellant's Counsel offer of proof was insufficient:

"Q Mr. Lupe, are you familiar with the police records in Whiteriver?

"A I don't." (RT 255, L 18-20)

Whether or not there are "numerous" arrests was not established.

Furthermore, Appellant's Counsel overlooks the point of the questions and the reasoning in *Michelson v. United States,* supra.

It is respectfully submitted the evidence was properly rejected.

VI.

CONCLUSION

There was sufficient evidence to find Coe Kane sane beyond a reasonable doubt and the jury was properly instructed and the evidence of the Government was properly admitted.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of the Brief of Appellee mailed this 31 day of February, 1968, to:

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